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NO. 51791-1-I  
COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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CITY OF AUBURN

Respondent/Cross-Appellant,

v.

TERESA A. HEDLUND,

Appellant/Cross-Respondent.

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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REVISED OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT

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## Appendix

Transcript of Videotape .....	Appendix "A"
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COMES NOW the Respondent/Cross-Appellant, City of Auburn, hereinafter the Plaintiff, and in response to the Appeal of the Appellant/Cross-Respondent, Teresa A. Hedlund, hereinafter the Defendant, and in pursuit of Plaintiff's appeal of the rulings of the King County Superior Court wherein certain decisions of the Auburn Municipal Court,<sup>1</sup> respectfully submits the following:<sup>2</sup>

**I. RESPONSE TO DEFENDANT'S [APPELLANT'S] BRIEF**

**A. DEFENDANT'S ASSIGNMENTS OF ERROR.**

The Defendant raised two assignments of error in her appeal, paraphrased as follows:

1. The Superior Court erred in ruling that the Defendant was not a victim, thus able to be an accomplice, under Section 9A.08.020 of the Revised Code of Washington (RCW).

2. The court erred in not dismissing the charges against her on double jeopardy grounds.

**B. ISSUES PERTAINING TO DEFENDANT'S ASSIGNMENTS OF ERROR.**

1. Was the Defendant a "victim" of the crimes with which she

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<sup>1</sup> By Order dated January 28, 2005, Commissioner Neel passed the Plaintiff's motion for discretionary review to the panel that considers the Defendant's appeal. *See* pleadings and submittals filed in Court of Appeals Cause No. 55065-9-I (consolidated herewith).

<sup>2</sup> It is with apologies to the Court that the crude and offensive language used by the participants is referenced herein. But, this is necessary in order to accurately depict their efforts to compete in outrageous conduct when being recorded on video.

was accused as an accomplice so that, per RCW 9A.08.020(5)(a), she could not be an accomplice? (Defendant's Assignment of Error 1.)

2. After the trial court granted the Defendant's motion to dismiss, did further proceedings on the charges violate the Constitutional prohibition against double jeopardy? (Defendant's Assignment of Error 2.)

The answer to both of these issues is No.

#### C. STATEMENT OF THE CASE

On July 16, 2001, a vehicle driven by Tom Stewart (Tom), crashed into a cement pillar at 15th Street SW, in Auburn, Washington, killing the driver and his passengers, Timothy Stewart (Tom's twin brother), Jayme Vomenici, Marcus Cooper, Brandon Dupea and April Byrd. April was 17 years of age. (CP 772-776, 1118 [King County Superior Court Cause No. 03-1-04645-7 SEA].)<sup>3</sup> The Defendant, Teresa Hedlund, was the only survivor. (CP 792 SEA.) The Auburn Police Department investigated the accident and concluded that the accident was caused by excessive speed and alcohol, not mechanical difficulties. (CP 775, 793-94, 871, 969-1000 SEA.)

A camcorder was found in the accident vehicle. (CP 893 SEA.) The

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<sup>3</sup> This case involves the consolidated appeal of two separate but related Superior Court actions, with two separate Superior Court Cause Numbers [King County Superior Court Cause No. 03-1-04645-7 SEA and 03-2-00810-9 KNT]. Each case had separate designations of Clerk's Papers. To clarify the case to which the Clerk's Papers refer hereafter, Clerk's Papers designations are labeled as (CP \_\_, KNT) for King County Superior Court Cause No. 03-2-00810-9 KNT, and as (CP \_\_, SEA) for King County Superior Court Cause No. 03-1-04645-7 SEA.

videotape from that camcorder consisted of four (4) parts, the last two of which were admitted into evidence by the trial court. A transcript of that videotape is part of the record hereto (CP 9-15 KNT, CP 1187-92 SEA), a copy of which (CP 1187-92 SEA) is appended hereto, marked as Appendix "A," for convenient reference.<sup>4</sup> (*See also* CP 9-15 KNT.)

Part three of the tape showed a party at the Defendant's apartment occurring just prior to the fatal car trip, and the fourth part showed the activity in the vehicle prior to the crash. (CP 1260-62 SEA [the videotape].) Part three of the videotape showed that the Defendant furnished liquor to the party-goers and provided tobacco to a minor. (CP 1260-62, 852, 855, 874-75 SEA.) The party-goers acted out and showed off for the camera, encouraged by the Defendant. Part three of the tape showed that the Defendant went so far as to call for the camera to record her four-year-old daughter's smoking and dancing (Kennedy, go grab my cigarettes off of the fireplace ... Look at what my daughter's doing .... Shake your moneymaker for the camera. CP 1188-89 SEA).

The party-goers were asked to leave by the Defendant's mother [with whom the Defendant resides] when she returned home from work. (CP 516-

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<sup>4</sup> It would be important for this Court to review the actual videotape (CP 1260 SEA), in addition to a review of the transcript, to fully appreciate the issues before this Court and those that were before the trial court. [In addition to the Exhibit (CP 1260 SEA), a copy of the videotape was appended to the Plaintiff's Petition for Review.]

18 SEA.) There was an argument about who would drive. (CP 542 SEA.) Jayme Vomenici (Jayme) was the only person who hadn't been drinking (CP 543-44, 553, 1182, 1260-62 SEA), but she was not allowed to drive her own vehicle. (CP 1260-62 SEA.). Tom Stewart was heard to say that he was most sober out of them all, which was not the case.

Part four of the videotape showed the events in the vehicle during the last few minutes of six young peoples' lives. (CP 1260-62 SEA.) Seven people were crammed into the two-door, four-passenger vehicle. This required the two smallest people in the vehicle, Jayme and April, to sit on the laps of the bigger people, forcing Jayme, the sober owner of the vehicle, into the back seat. (CP 1117-19 SEA.)

The Defendant was in the front passenger seat, facing backwards, operating the videotape recorder, recording the actions, statements and responses of herself, the driver and other passengers in the vehicle. (CP 1260-62, 1187-92 SEA.) The videotape also showed that the party-goers' competition to show off for the camera and to act out continued in the car. (CP 1260-62, 1187-92 SEA.)

As Tom drove, the Defendant filmed him leaning into the camera saying, "It's me driving - Record this shit nigga." (CP 13 KNT, CP 1190, 1260-62 SEA.) The Defendant knew that Tom had been drinking. She was present in the parking lot when he said he was "fucked up" (CP 552 SEA),

and at the party when he said he was “liquored up.” (CP 12 KNT, CP 1189, 1260-62 SEA.) Tom continually acted out and show-boated for the camera during the party, yet the Defendant continued to encourage his behavior in the car, while he was driving. Later, almost immediately before the collision, Tom said toward the camera “I’m going to kill all of us right now.” (CP 15 KNT, CP 1191, 1260-62 SEA.) And although Jayme and others were fearful, the Defendant merely said that Tom was being “funny.” (CP 14 KNT, CP 1191, 1260-62 SEA.) Seconds later, six of the seven people in the car were dead.

The Defendant was charged in the Auburn Municipal Court with Driving Under the Influence of Intoxicants (DUI) by Accomplice Liability, per RCW 46.61.502 and RCW 9A.08.020, Reckless Driving by Accomplice Liability, per RCW 46.61.500 and RCW 9A.08.020 (Cause No. C78961); and with Furnishing Liquor to a Minor, per Section 9.01.420 of the Auburn City Code (ACC) and Furnishing Tobacco to a Minor, per RCW 26.28.080, and RCW 39.34.180 (Cause No. 1C7374).

At a jury trial in the Auburn Municipal Court, in late January and early February, 2003, the Defendant was found guilty of the offenses of DUI as an Accomplice, Furnishing Liquor to a Minor and Furnishing Tobacco to a Minor, and found not guilty of Reckless Driving. (CP 162 SEA.) However, prior to those verdicts, after the close of the Plaintiff’s case in the jury trial,

the Defendant brought a Motion to Dismiss the charges of DUI by Accomplice and Reckless Driving by Accomplice. (CP 35-38 KNT.) *See also* (CP 574-98 SEA.) The Defendant argued that she was a victim of Tom's driving and therefore, pursuant to RCW 9A.08.020(5)(a), she could not be an accomplice. The trial court seemingly reluctantly agreed, ruling that the:

Washington state legislature, in its infinite wisdom, or some would say lack thereof, has a statute that - I'm not quite sure what they were thinking when they drafted this statute ... [that] says if [people] are a victim of that crime, they are not an accomplice to the crime committed by the other person.

(CP 597 SEA).

Thereafter, the Plaintiff immediately requested, and was granted, a recess to seek a writ of review from the King County Superior Court. (CP 598, 602 SEA.) The Defendant's attorney did not object to the request. (CP 600 SEA), and the trial court recessing to the next week. (CP 602 SEA.) The Plaintiff's application for a Writ of Review was filed that next morning. After several hearings and arguments, the King County Superior Court reversed the trial court's ruling on the accomplice - victim statute, and reinstated the DUI and Reckless Driving charges. (CP 71-73 KNT.)

#### D. ARGUMENT.

The Defendant did a number of things that encouraged, aided and promoted Tom's illegal driving, all of which were completed before she could be said to have been the victim of anything. Thus, even though a

person who “is” a victim when the criminal acts occur cannot be an accomplice, that does not apply to the Defendant in this case. Furthermore, immediately upon the trial court’s ruling, the Plaintiff requested a recess to seek review of the ruling. Under these circumstances, double jeopardy does not apply, and does not warrant dismissal.

The Defendant (1) had an alcohol party at her apartment, (2) provided alcohol to the party-goers, and got into the already over-crowded four-seat vehicle, preventing the owner of the vehicle – the only one who hadn’t been drinking – from driving. That set the stage for Tom to drive and contributed to Tom’s DUI and Reckless Driving. Per RCW 9A.08.020(3), the Defendant was an accomplice of Tom’s illegal driving since she knowingly promoted and facilitated his commission of the crimes of DUI and Reckless Driving. She encouraged and prompted him to commit crimes and aided him in committing them.

The Defendant argues that since she was injured as a result of Tom’s driving, she cannot be his accomplice.<sup>5</sup> However, that ignores the fact that the accomplice complicity was completed long before the Defendant suffered any injury. Her argument is analogous to a “get-away driver” in a bank robbery who is accidentally shot by the bank robber during the get-away claiming to be a victim and thus not an accomplice.

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<sup>5</sup> Per RCW 9A.08.020(5)(a).

## 1. ACCOMPLICE STATUTE

RCW 9A.08.020(3), provides that a person is an accomplice of another person in the commission of a crime if, with *knowledge* that it will *promote* or *facilitate* the commission of the crime, he or she *encourages* such other person to commit a crime or *aids* such other person in ... committing it. *See In re Domingo*, 155 Wn.2d 356, 119 P.3d 816 (2005); *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000).

The Defendant was the person operating the video camera, she - more than anyone else - saw what was going on. She knew what was going on, and from where she was positioned in the front passenger seat, and using the video camera to encourage Tom's behavior, she was an accomplice of Tom's illegal driving.

But, the Defendant cites RCW 9A.08.020(5)(a) for the proposition that she cannot be an accomplice because she was a victim:

9A.08.020      Liability for conduct of another--Complicity

...

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He *is* a victim of that crime ... (emphasis added.)<sup>6</sup>

The Defendant's argument does not make sense. Even if the Defendant could be said to be a victim of a crime under RCW 7.68.020(3) or

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<sup>6</sup> The full text of RCW 9A.08.020 is appended hereto, marked as Appendix "B," for convenient reference.

RCW 9.94A.030(47),<sup>7</sup> that crime was committed *before* the Defendant became a victim. Tom was driving recklessly from almost the second he got behind the wheel, and the Defendant encouraged him to do so with the video camera. She was thus an accomplice to Tom's illegal driving long before he struck the concrete pillar.

If a crime has already been committed, whether by principal or accomplice, the fact that anybody later became a victim, does not undo what already happened. RCW 9A.08.020(5)(a) *DOES NOT SAY* that a person is not an accomplice if he or she *LATER BECOMES A VICTIM*. Rather, the statute says, a person *is not* an accomplice if the person *is* a victim.

The Defendant's argument is also inconsistent with the concepts of accomplice liability being measured *as of the time* of commission of the crime. RCW 9A.08.020(5)(b) states that a person is not an accomplice if he "terminates his complicity *prior to the commission of the crime...*" and then acts to inform the police or prevent the crime. Emphasis added. Analogously, becoming a victim after-the-fact does not absolve a person who is an accomplice to an already committed crime. The law places criminal liability at the point of time a criminal act is done.

## 2. STATUTORY CONSTRUCTION

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<sup>7</sup> RCW 9.94A.030 was incorrectly cited by the Defendant in her Brief as RCW 9.94.030.

In construing statutes, the court is to carry out the Legislature's intent, as determined primarily from the statutory language. *State v. Wilbur*, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988). Statutes are interpreted according to the plain and ordinary meaning of the language used. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Strained, unlikely, unrealistic or absurd consequences are to be avoided. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990); *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

The only construction of RCW 9A.08.020(5)(a) that makes sense is that a person cannot be criminally liable as an accomplice if, when the person does whatever acts would constitute accomplice liability, he or she is *at that time* a victim. These things must match in time. Again, nowhere in the law is there an after-the-fact exoneration, short of perhaps gubernatorial or presidential pardons (not applicable here). By way of analogy, a defendant's mental state is measured as of the time of the crime. *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). The assessment of whether a defendant had the ability to appreciate the nature of his or her actions or to form the required specific intent to commit a crime is made as of the time of the crime. *State v. Greene*, 139 Wn.2d 64, 65, 984 P.2d 1024 (1999). For this reason, the argument made by the Defendant is absurd, and strained. If she already committed a crime, that is not undone because she was later hurt.

The rules of statutory construction dictate that, in order to avoid an absurd result, the Defendant does not fall within the protections of RCW 9A.08.020(5)(a), since she was not a victim when she was an accomplice. Any actions she took that aided or promoted Tom's illegal driving occurred before she could be said to be a victim.

3. INTERPRETATION OF STATUTE - RULE OF LENITY

The Defendant also argues that per the Rule of Lenity, the statute (RCW 9A.08.020(5)(a)) should be interpreted in her favor. It is only if a statute is ambiguous that, per the Rule of Lenity, any ambiguity is interpreted to favor a criminal defendant. *State v. Hepton*, 113 Wn. App. 673, 689, 54 P.3d 233 (2002), citing *State v. Spandel*, *supra*, and *State v. Bright*, *supra*. See also *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). But, a statute is not ambiguous merely because different interpretations are conceivable. *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996) (citing *State v. Sunich*, 76 Wn. App. 202, 206, 884 P.2d 1 (1994)). A statute is ambiguous if it can *reasonably* be interpreted in two or more ways. *In re King*, 146 Wn.2d 658, 665, 49 P.3d 854 (2002), citing *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). See also *State v. Thorne*, 129 Wn.2d 736, 763 n. 6, 921 P.2d 514 (1996).

When the language of a statute is clear and unambiguous, its meaning is to be derived from the language of the statute alone and it is not subject to

judicial construction. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

RCW 9A.08.020(5)(a) is not ambiguous, and that the Defendant's interpretation of the accomplice statute is unreasonable and strained, would result in absurd conclusions, and thus, must be rejected.

In addition to the question of *when* the Defendant would have been a *victim*, the question remains as to whether a person can be a "victim" of Reckless Driving. For instance, the purpose of the compromise of misdemeanor statute (RCW 10.22) is to provide "restitution to crime victims and avoidance of prosecution for minor offenders." *State v. Ford*, 99 Wn. App. 682, 686, 995 P.2d 93 (2000), citing *State v. Norton*, 25 Wn. App. 377, 380, 606 P.2d 714 (1980). The compromise of misdemeanor statute was not appropriate for Reckless Driving. *City of Seattle v. Stokes*, 42 Wn. App. 498, 712 P.2d 853 (1986).

"Because injury is not a necessary element of Reckless Driving, a compromise will inequitably be available only when an accident occurs. We hold that the compromise of misdemeanor should be permitted only for traffic offenses whose elements include injury to persons or property."

*Id.* at 502. However, again, even if the Court concludes that the Defendant "could" be a victim of Reckless Driving, that would not change the fact that if she committed the accomplice offenses, she committed them *before* she could have been a victim. In that regard, if there never had been an accident,

the offenses would have been committed just the same. That further illustrates the fact that subsequently acquired "victim status" would not change the commission of such prior offenses.

4. DEFENDANT NOT ENTITLED TO VICTIM STATUS

*Hansen v. Department of Labor and Industries*, 27 Wn. App. 223, 615 P.2d 1302 (1980), holds that one is not a victim of a crime if he or she caused or contributed to his or her injuries. The evidence here shows that the Defendant was not seat-belted and that she was kneeling in the front passenger seat, facing the back seat passengers. Additionally, she knew that Jayme Vomenici had not been drinking and that Tom had. In addition to her having hosted the party and supplied alcohol to the party-goers, the Defendant got into Jayme's car (with the video camera) effectively prevented Jayme from driving. Her complicity in the tragedy was significant.

5. DOUBLE JEOPARDY

The Defendant also argues that under the doctrine of double jeopardy she should not be vulnerable to prosecution as an accomplice since the trial judge ruled in her favor on her prosecution. Double jeopardy prohibits a person from being tried twice for the same offense(s). But, in the case before this Court, the Defendant was tried only once. No double jeopardy violation occurred, and the jury was out in recess during the time of the pending, immediate interlocutory review of the trial court's ruling on the victim –

accomplice statute by the Superior Court.

The double jeopardy clauses of the Fifth Amendment<sup>8</sup> to the United States Constitution and Art. I, § 9<sup>9</sup> of the Washington State Constitution precludes *retrial* after acquittal. *Burks v. United States*, 437 U.S. 1, 16, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996). The state prohibition against double jeopardy does not provide broader protection than the federal double jeopardy clause. The two are interpreted identically. *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995); *State v. Netling*, 46 Wn. App. 461, 731 P.2d 11 (1987).

In *Burks, supra*, the court held that the double jeopardy clause also bars a *second trial* even where the evidence, including any erroneously admitted evidence, has been deemed legally insufficient. *Burks v. United States*, 437 U.S. at 11; *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). See also *Smalis v. Pennsylvania*, 476 U.S. 140, 144-45, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

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<sup>8</sup> United States Constitution, Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>9</sup> Washington State Constitution, Article I § 9. Rights of Accused Persons.

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

However, these cases do not apply. The Defendant was not subjected to a second trial. She was only tried once. Also, even though the trial court did rule in favor of the Defendant on her accomplice-victim motion at the close of the prosecution's case, the Plaintiff immediately requested the opportunity to seek a writ of review, to which the Defendant did not object, and with which the trial court agreed. Moreover, according to *State v. Collins*, 112 Wn.2d 303, 771 P.2d 350 (1989), a case curiously also cited by the Defendant, a ruling is final only after it is *signed by the trial judge* in the journal entry *or is issued in formal court orders*. *Collins*, 112 Wn.2d at 308 (emphasis added), *citing State v. Aleshire*, 89 Wn.2d 67, 568 P.2d 799 (1977); *State v. Mallory*, 69 Wn.2d 532, 419 P.2d 324 (1966); *Chandler v. Doran Co.*, 44 Wn.2d 396, 267 P.2d 907 (1954); and *State v. McClelland*, 24 Wn. App. 689, 604 P.2d 969 (1979), *review denied*, 93 Wn.2d 1019 (1980). For perspective, *State v. Collins* overruled the prior standard for determining the finality of rulings under *State v. Dowling*, 98 Wn.2d 542, 656 P.2d 497 (1983), where a trial court's ruling, as viewed, is final when "read conclusively into the record" without qualification. *Collins*, 112 Wn.2d at 305. The *Collins* Court instead reasoned that a trial court's oral ruling alone was inadequate to establish finality:

Individual trial judges' styles of ruling vary. Many judges will think out loud along the way to reaching the final result. It is only proper that this thinking process not have final or binding effect until formally incorporated into the findings,

conclusions, and judgment.

*Id.* at 308.

In this case, it cannot even be said that the trial judge read his ruling conclusively into the record (the former standard – overruled by *Collins*).

THE COURT: Washington state legislature, *in its infinite wisdom*, or some would say *lack thereof*, has a statute that - *I'm not quite sure what they were thinking when they drafted this statute*. I've looked at the legislative history, and I can find nothing that would indicate what the thought process was behind excluding a person from being charged with or convicted of aiding and abetting has been a victim of that crime. The statute does not state that they would not be responsible for acts up to the time they became a victim. It just says if they are a victim of that crime, they are not an accomplice to the crime committed by the other person.

(CP 597 SEA.) But clearly, the trial judge did not meet the *Collins* standard.

No entry or order was signed by the judge. Docket entries later made by a clerk do not meet that standard. Moreover, upon the trial court's verbal pronouncement dismissing the accomplice charges, the Plaintiff immediately requested that the trial court grant leave to file an immediate writ. (CP 598 SEA.) Additionally, the Defendant did not object, and in fact indicated that they could live with what the superior court did.

MR. CAMPBELL: I suppose, if the City - if the Court agreed with this timing, and the City presented an appropriate writ in an order to the superior court, then there would be - I could not interpose an appropriate objection.... So if the City proceeds to superior court, I live with what happens in superior court.

(CP 599 SEA), and

MR. CAMPBELL: I'll cooperate with attempts to get this matter heard in superior court.

(CP 600 SEA.) Thereafter, the trial court agreed, and released the jurors for the weekend without bringing them back into the courtroom (they were in the jury room during the motion, arguments and above exchanges). (CP 602 SEA.) This then brings up the other reasons double jeopardy does not apply: The Defendant waived it. The Defendant not only failed to object on the basis of double jeopardy at trial, the defense agreed to the writ. Double jeopardy is a personal right which if not affirmatively plead at the time of trial will be regarded as waived. *U.S. v. Parker*, 368 F.3d 963 (7<sup>th</sup> Cir 2004), *citing United States v. Buonomo*, 441 F.2d 922, 924 (7th Cir.1971). *See also Peretz v. United States*, 501 U.S. 923, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991).

Additionally, the double jeopardy clause "does not relieve a defendant from the consequences of his voluntary choice." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123, 123 S.Ct. 732, 71 USLW 4027, 2003 Daily Journal D.A.R. 427, 154 L.Ed.2d 588, 03 Cal. Daily Op. Serv. 363, 16 Fla. L. Weekly Fed. S 25 (2003), *citing U.S. v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). The underlying purpose of the double jeopardy clause is to prevent the State from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Id.* (*quoting Green v. United States*, 355 U.S. 184, 187, 78 S.Ct.

221, 2 L.Ed.2d 199 (1957)).

Therefore, even without the waiver (failing to object – and in fact agreeing to the writ), double jeopardy would not be triggered (even if it were to otherwise apply) because the Defendant volitionally sought to circumvent the trial process through her motion at the close of the prosecution case. But, again, first and foremost, double jeopardy does not apply because there was no second trial and because the standard in *Collins* has not been met under the facts of this case.

## **II PLAINTIFF’S [RESPONDENT’S] CROSS-APPEAL**

### **A. PLAINTIFF’S ASSIGNMENTS OF ERROR**

Plaintiff’s Cross-Appeal stems from the RALJ (Rules for Appeal of Decisions of Courts of Limited Jurisdiction) appeal filed by the Defendant, from her convictions in the Auburn Municipal Court (the trial court). The RALJ Appeal was heard by the King County Superior Court (the RALJ court) under Cause Number 03-1-04645-7 SEA.

1. The RALJ court erred in ruling in its September 3, 2004 order that the trial court erred in denying the Defendant’s Motion for Severance of the Furnishing Tobacco to a Minor offense from the other offenses charged against said Defendant.

2. The RALJ court erred in ruling in its September 3, 2004 order that the trial court erred in allowing the jury to hear the tape recording of the

911 call from a witness who came upon the scene of the accident; and

3. The RALJ court erred in ruling in its September 3, 2004 order that the trial court erred in admitting into evidence portions of a videotape showing the Defendant's young daughter with a lit cigarette in her mouth and dancing provocatively.

**B. ISSUES PERTAINING TO PLAINTIFF'S ASSIGNMENTS OF ERROR**

1. Was it manifest abuse of discretion for the trial court (the Auburn Municipal Court) to deny the Defendant's request to sever the charge of Furnishing Tobacco to a Minor from the other charges pending against the Defendant? (Plaintiff's Assignment of Error 1.)

Answer: No.

2. In light of the theory of the Plaintiff's case, and under the facts of the case, did the trial court have authority and discretion to deny the Defendant's motion to sever the Furnishing Tobacco count? (Plaintiff's Assignment of Error 1.)

Answer: Yes.

3. Was it manifest abuse of discretion for the trial court to allow the jury to hear the tape recording of the 911 call from a witness who came upon the scene of the accident? (Plaintiff's Assignment of Error 2.)

Answer: No.

4. Was that 911 recording relevant, in any way, to the charges

pending against the Defendant? (Plaintiff's Assignment of Error 2.)

Answer: Yes.

5. Was it manifest abuse of discretion for the trial court to admit into evidence portions of a videotape showing the Defendant's young daughter with a lit cigarette in her mouth and dancing provocatively? (Plaintiff's Assignment of Error 3.)

Answer: No.

6. Were the portions of a videotape showing the Defendant's young daughter with a lit cigarette, and dancing, etc., relevant to other charges pending against the Defendant? (Plaintiff's Assignment of Error 3.)

Answer: Yes.

7. Should any review of the trial court decisions, regarding suppression of a portion of the videotape and severance of the Furnishing Tobacco charge, be made with consideration of the issues as they were pending at the time that the trial court made its rulings (rather than the status of the charges when the RALJ appeal was being heard)?<sup>10</sup> (Plaintiff's Assignments of Error 1 & 3.)

Answer: Yes.

8. Ultimately, should the RALJ court have reversed the trial

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<sup>10</sup> The Defendant was found by the jury to be not guilty of the charge of Reckless Driving - Accomplice Liability, but the evidentiary rulings of the trial court in question in this case were made prior to that not guilty finding.

court's rulings regarding severance and admissibility of evidence?  
(Plaintiff's Assignments of Error 1, 2 & 3.)

Answer: No.

C. STATEMENT OF THE CASE

In addition to the Statement of the Case set forth above, in connection with the Plaintiff's Response to the Defendant's Appeal (starting on Page 3 hereof), the Plaintiff respectfully submits the following additional facts:

The videotape recording (CP 1260-62 SE), consisted of four (4) parts, but only parts three and four were admitted into evidence by the trial court. Part three of the videotape showed activity at the party at the Defendant's apartment. The fourth part showed the activity in the vehicle up to just before the fateful crash. Both the third and fourth portions of the videotape showed deliberate efforts by those in attendance to vie for attention by engaging in what appeared to be increasingly outrageous conduct. Portion three also showed the Defendant furnishing tobacco to a minor, as well as evidence supporting the Plaintiff's allegation that the Defendant furnished liquor to a minor. (CP 1260-62 SEA.)

In portion four, the Defendant was seated backwards in the front passenger seat with the videotape recorder, recording the actions, statements and responses of herself, the driver and other passengers in the vehicle. (CP 1260-62, 1187-92 SEA.) The videotape also showed that the competition to

show off for the camera, vie for camera attention and act out continued from the party to the driving parts of the videotape. (CP 1260-62, 1187-92 SEA.)

In addition to the accomplice charges (DUI by Accomplice Liability and Reckless Driving by Accomplice Liability), the Defendant was charged in the Auburn Municipal Court with Furnishing Liquor to a Minor, per 9.01.420 of the Auburn City Code (ACC); and Furnishing Tobacco to a Minor, per RCW 26.28.080, and RCW 39.34.180, with the furnishing charges having been filed in the Auburn Municipal Court under its Cause Number 2C7374. Even though the jury ultimately found the Defendant not guilty of Reckless Driving via accomplice liability, that charge was before the trial court, and the trial court's decisions need to be considered and reviewed in light of what was before it at the time, not what may have been the ultimate jury verdict. It appears that the RALJ Court (SEA) may not have considered that, and that may have contributed to the RALJ rulings.

Prior to trial in the Auburn Municipal Court, multiple pre-trial motions were filed by the Defendant, which were accompanied by lengthy briefing and argument at the numerous hearings, including, but not limited to the following:

- Defendant's Motion to Sever Counts (CP 1266-73 SEA).
- Plaintiff's Response to Motion to Sever Counts (CP 1274-91 SEA).
- Defendant's Response re: Motion for Severance (CP 1292-95 SEA).
- Hearing on Motion for Severance – October 29, 2002 (CP 38-74

SEA).

- Motion for Reconsideration of Motion to Sever (CP 1296 SEA).
- Memorandum of Points and Authorities (CP 1297-99 SEA).
- Plaintiff's Response to Motion for Reconsideration (CP 1300-06 SEA).
- Hearing on Reconsideration of Motion for Severance – November 12, 2002 (CP 75-97 SEA).
- Motion in Limine (CP 1307-13 SEA).
- Plaintiff's Response to Motion in Limine (CP 1314-32 SEA).
- Hearing on Motion in Limine – January 27, 2003 (CP 212-52 SEA).

As noted above, among those pretrial motions was a Motion in Limine in which the Defendant objected to the introduction of the videotape. (CP 212, et seq. SEA.) Out of the Motion in Limine, (January 27, 2003) the Municipal Court ruled that only parts three and four of the videotape were relevant to the case, and only those portions were played during the trial. (CP 240 SEA.) The Defendant brought other motions, including a Motion to Sever Counts (October 29, 2002), and a Motion to Reconsider Severance (after denial) (November 12, 2002), in addition to the Motion in Limine (January 27, 2003) (CP 213-53 SEA), at which hearing the 911 tape was found to be admissible. (CP 216-20 SEA.)

In the jury trial in the Auburn Municipal Court, occurring in late January and early February, 2003, the Defendant was found guilty of the offenses of DUI by Accomplice Liability, Furnishing Liquor to a Minor and Furnishing Tobacco to a Minor, and found not guilty of Reckless Driving by Accomplice Liability. (CP 162 SEA.) The Defendant appealed from those

convictions raising eleven (11) assignments of error. The Defendant's appeal (RALJ appeal) was heard by the Honorable Mary E. Roberts, Judge of the King County Superior Court, under Cause Number 03-1-04645-7 SEA. Thereafter, the Superior Court (RALJ court), by order dated September 3, 2004, upheld the trial court's rulings regarding eight (8) of the complained assignments of error, but ruled against the Plaintiff on three trial court rulings, finding that the trial court abused its discretion, and further ruled that a new trial was warranted, remanding the case back to the Auburn Municipal Court for a new trial. (CP 1255-1259 SEA.)

The three rulings where the RALJ court ruled that the trial court abused its discretion were (1) the trial court's denial of the Defendant's Motion for Severance of the Furnishing Tobacco to a Minor offense from the other offenses charged against said Defendant (CP 1256 SEA); (2) the trial court's ruling allowing the jury to hear the tape recording of the 911 call from a witness who came upon the scene of the accident (CP 1257 SEA); and (3) the trial court's ruling admitting into evidence that portion of the videotape showing the Defendant's young daughter with a lit cigarette in her mouth and showing the daughter dancing provocatively, during which the Defendant can be heard saying "[s]hake your moneymaker for the camera." (CP 1258 SEA.)

#### D. SUMMARY OF ARGUMENT ON PLAINTIFF'S CROSS-APPEAL

Case law rightfully gives great deference to a trial court's

determinations regarding such issues as joinder and severance of charges, as well as the relevance and probative versus prejudicial value of evidence (whether the probativeness of the evidence is substantially outweighed by unfair prejudice). Moreover, this deference is to be given the lower court (trial court) by the Superior Court when the Superior Court is acting in an appellate capacity, as is the case whenever a case is appealed from a district or municipal court. The function of the Superior Court under RALJ is "appellate" in nature, and is thus more in conformity with the role of the court as provided in Wash. Const. Art. IV, § 6. With the RALJ appeal rules, more credence is given to the lower court decisions. *State v. Young*, 83 Wn.2d 937, 523 P.2d 934 (1974).

In the matter before this Court, the Defendant challenged a number of evidentiary rulings made by the trial court, the Auburn Municipal Court. For instance, the Defendant argued that videotape evidence of her young daughter smoking and dancing in a sexually provocative manner at the direction and coaxing of the Defendant and others at the party at which the videotape was taken was not relevant, and should not have been included in the same trial.

That prompted Judge Roberts to rule in part that:

[t]he portions of the videotape that show the defendant's four-year-old daughter with a lit cigarette in her mouth were not relevant to any charge other than furnishing tobacco to a minor. Nor were the portions of the videotape relevant that showed the child dancing provocatively while the defendant said "[s]hake your moneymaker for the camera."

Judge Roberts' Order, Page 4 (CP 1258 SEA).

Judge Robert's assessment, however, ignored the crucial theory of the Plaintiff's case and the charges pending in the Municipal Court at the time it ruled, which included Reckless Driving as an Accomplice. The Plaintiff's stated theory of that charge was that the use of the video camera was to solicit, promote and encourage others to act out in what seemed like a competition to act most shocking and outlandish, and that continued right into the driving that resulted in the fatal crash. The facts of this case are unusual for a number of reasons, including that the dangerous driving concluded in the single-car accident that took the lives of six young people, and that the moments leading up to the vehicle's collision with a concrete pillar were recorded from within the vehicle on videotape.

Because so much of this case related to suppression of portions of the videotape and whether the Furnishing Tobacco to a Minor charge should have been severed, it is important that this Court view that videotape (both the party at the Defendant's apartment and the later driving) in order to measure the propriety of the trial court's rulings. But, such rulings must be considered as the issues were at the time that the trial court made its rulings.

If trial courts do not receive the significant deference they are due with respect to their rulings regarding joinder versus severance, relevance and prejudice versus probative value of evidence, all parties to the proceedings

will be left with significant uncertainty as to the trial court's proceedings, and the end result would be to create a greater potential for appeals, particularly if the appeal could ask a new judge to re-do the decision-making process in a different perspective than that which was involved by the trial court when its decisions were first made.

In addition, particularly where the evidentiary rulings of the trial court have involved voluminous pleadings and arguments in advance of trial, they need to be given the fullest discretionary benefit possible. Parties to any legal proceedings need to be able to depend upon the trial court rulings so that they may know how best to prepare their cases and know how best to approach the issues. Moreover, if trial court decisions are too vulnerable to second-guessing, after the fact, and from a perspective different than that which existed when the trial court was acting, the uncertainty would pose a greater temptation – incentive for appeal.

It is within the interests of all courts that even where different judges may have different decisions on similar topics, when the parties bring issues to the trial court, the greatest deference should be given to the decision of the trial court. In this case, the Plaintiff respectfully submits that the differences of opinion between Judge Roberts and the trial judge do not involve a manifest abuse of discretion, even though the two judges came to different conclusions. However, Judge Roberts' perspective was different than that

faced by Auburn Municipal Court Judge Patrick Burns. Judge Burns not only had the advantage of all of the pre-trial briefing and argument, he had the important role/responsibility of presiding over the trial.

#### E. ARGUMENT

The King County Superior Court, whose decisions are subject of this appeal, was not the trial court. The decisions being appealed are the reversals of discretionary decisions of the trial court (the Auburn Municipal Court) made while the RALJ court was acting in an appellate court capacity. Accordingly, the RALJ court should have applied the appropriate level of deference to the trial court in its review of this matter.

##### 1. STANDARD FOR APPELLATE REVIEW

With respect to the evidence which was presented to the *trial* court, the appropriate standard for review is as set forth in *State v. Bingham*, 105 Wn. 2d 820, 719 P. 2d 109 (1986), as follows:

The constitutional standard for reviewing the sufficiency of a criminal trial is “whether after reviewing the evidence in the light most favorable to the Prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 268 (1980). (Emphasis the Court’s).

*Bingham*, 105 Wn. 2d at 823. See also *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“In determining whether the necessary quantum of proof exists, the

reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the [prosecution's] case." *State v. Dejarlais*, 88 Wn. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wn.2d 939, 969 P.2d 90 (1998).

Where the Superior Court is acting as an appellate court, as in this case, it shall accept those factual determinations supported by substantial evidence in the record which were expressly made by the court of limited jurisdiction or which may reasonably have been inferred from the judgment of the court of limited jurisdiction. *State v. Basson*, 105 Wn. 2d 314, 714 P. 2d 1188 (1986). It is not for the Superior Court's scope of review to examine the evidence de novo. *Seattle v. Hesler*, 98 Wn.2d 73, 653 P. 2d 631 (1982). Furthermore, in reviewing a trial court's record, the reviewing court must take great care not to substitute its own judgment. *State v. O'Connell*, 83 Wn.2d 797, 523 P. 2d 872 (1974), *State v. Valentine*, 75 Wn. App. 611, 620, 879 P.2d 313 (1994).

## 2. RALJ COURT RULINGS

The RALJ court, in this case, ruled that a portion of the videotape showing the Defendant's young daughter smoking and dancing provocatively should not have been admitted. Ironically, these actions were at the behest of the child's mother, the Defendant. More importantly, these actions were part of a common scheme in which the Defendant and the others in attendance at

the party and later in the vehicle participated – to use a video camera to solicit, promote and encourage others to act out in a competition to act most shocking and outlandish behavior. The RALJ court also ruled that that one of the charges, Furnishing Tobacco to a Minor, should have been severed from the other charges.

### 3. TRIAL COURT DISCRETION

The evidentiary rulings and rulings as to what is relevant are the province of the trial court. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule of Evidence (ER) 401. Further, per ER 403 the trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Such determinations are left to the sound discretion of the trial court. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986); *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984). And it is within the trial court’s discretion to decide, if evidence will assist the jury. ER 702; *Norris v. State*, 46 Wn. App 822, 733 P.2d 231 (1987).

Broad discretion must be accorded the trial court in such matters for the reason that the trial judge is in a superior position to evaluate the impact of the evidence, since the trial judge sees the witnesses, defendants, jurors and counsel, their mannerisms and reactions. *State v. Coe, supra, quoting*

with approval, *United States v. Robinson*, 560 F.2d 507, (2nd Cir. 1977), cert. denied, 435 U.S. 905 (1978). As noted by the court in *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986), the trial court has considerable discretion in balancing the probative value of evidence against its potential prejudicial impact.

#### 4. MANIFEST ABUSE OF DISCRETION STANDARD

The trial court's decisions to admit relevant evidence will not be reversed absent manifest abuse of its discretion. *State v. Smith*, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). *State v. Hightower*, 36 Wn. App 536, 676 P.2d 1016 (1984). See also *State v. Luvene*, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). Likewise, the trial court's decision regarding prejudicial effects of evidence will only be reversed for a manifest abuse of discretion. *State v. Lough*, 125 Wn.2d 847, 861-63, 889 P.2d 487 (1995); *State v. Rupe*, 101 Wn.2d 664, 683, P.2d 571 (1984). See also *State v. Halstien*, 122 Wn.2d 109, 125, 857 P.2d 270 (1993).

An abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or untenable reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). See also *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Additionally, a court abuses its discretion when no reasonable person would

take the trial court's view. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) (citing *Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979); *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)). Looking at the charges that were pending before the trial court when the discretionary decisions were made, and looking at how the videotape supported (could support) the Plaintiff's theory (promoting a competition of shocking and outlandish behavior – even in Tom's driving), it cannot be said that the trial court's decisions were such that no reasonable person would reach the trial court's view. They were therefore not an abuse of the trial court's discretion. The consideration of whether the views adopted by the trial court judge were reasonable (or whether they were so unreasonable that no reasonable person would adopt them) must factor in recognition of the scope of the trial judge's review of the matters involved. Perhaps more than any other non-felony prosecution case in this state, this case imposed upon the trial judge voluminous pleadings and extensive arguments on the many pre-trial motions. This was not a case where the issues that had to be decided were approached for the first time at trial. Rather, as the record shows, this case had almost weekly pre-trial motion hearings leading up to the trial. The sheer volume of pleading pages of the motions, responses and replies exceed many times over that which would be involved in most felony cases in this state. The lengthy list is set forth herein, *infra*.

Here, the trial judge not only had more extensive pleadings to review, he heard lengthier argument on the issues, and had significantly greater time within which to contend with the issues, not only in terms of the many hearings, but also in terms of the many months over which these issues were being presented to him. This greater exposure (greater in terms of depth and scope) gave Judge Burns a better handle of the issues than would have been the case were the matters merely exposed to him at trial or in any more abbreviated fashion. Even if other judges might have reached different conclusions in these issues, it cannot be said that no reasonable person would have reached the same conclusions or adopted the same views. His decisions were not abuses of discretion.

##### 5. SEVERANCE OF FURNISHING TOBACCO CHARGE

The trial court did not abuse its discretion when it denied the Defendant's request to sever the Tobacco charge from the other pending counts.

The trial court's decision not to sever counts properly joined under CrR 4.3(a) [or CrRLJ 4.3(a) – essentially identical language] is reversible only upon a showing that the court's decision was a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990). As noted above, that means that the trial court's decision not to sever the furnishing tobacco charge could be overturned only if no other reasonable person could

have adopted the view of the trial judge. In all fairness, that cannot be said.

Under CrR (and CrRLJ) Rule 4.3(a), offenses may be joined if the offenses “(1) Are of the same or similar character, even if not part of a single scheme or plan; *or* (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” Pursuant to CrR 4.3.1(a) and CrRLJ 4.3.1(a), “[o]ffenses or defendants properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.” Rule 4.4 (both CrR and CrRLJ) states in pertinent part that the court shall grant a motion for severance, “if, before trial ... it is deemed appropriate to promote a fair determination of the guilt or innocence of the defendant.” But, severance is not favored in Washington, and a defendant challenging the denial of a motion to sever bears a heavy burden of demonstrating abuse of discretion. *State v. Robinson*, 38 Wn. App. 871, 881, 691 P.2d 213 (1984).

#### 6. THEORY OF PROSECUTION CASE

The RALJ court, finding that the portion of the videotape which showed the Defendant's young daughter smoking and dancing suggestively was not relevant to the other charges (so that this portion of the videotape should have been suppressed, and the Furnishing Tobacco charge should have been severed from the other charges) ignored the crucial theory of the Plaintiff's case and ignored the charges pending in the Municipal Court at the

time the Municipal Court ruled, including Reckless Driving as an Accomplice. The Plaintiff's theory as to that charge was that the use of the video camera was to solicit, promote and encourage others to act out in what seemed like a competition to act most shocking and outlandish. Just as the camera was wielded to prompt exaggerated, outlandish behavior at the party in the Defendant's apartment, it was used by the Defendant in the vehicle to prompt the same type of exaggerated, outlandish behavior by the driver, Tom, and by others in the vehicle.

The Plaintiff theorized that the outlandish behavior of the driver of the fateful vehicle was promoted and encouraged by the use of the camera throughout the day in question, with an intentional competition for the chance to do something outlandish or shocking on camera. (CP 239-47, 684-701 SEA.) With that, it wasn't just that the Defendant gave her daughter a cigarette or that she had her dance, it was that she did so *for the video camera*. That is illustrated by the statements of the Defendant when having her daughter act out for the camera, as follows:

Teresa	Kennedy, go grab my cigarettes off of the fireplace.
Kennedy	Ok.
...	
Teresa	Kennedy, Kennedy, Kennedy, Kennedy, Kennedy. On the fireplace, right up here honey.
...	

Teresa        *Look what my daughter's doing*<sup>11</sup> (as the young daughter is smoking a cigarette).

...

Teresa        No, no wait hon – give me your cigarette.

...

Teresa        Shake your moneymaker *for the camera*.

...

Teresa        Shake your moneymaker *for the camera*.

(CP 1188 SEA.)

That same competition for “the camera” carried through with the driver (Tom) and others during the driving before the fateful accident, e.g.,

Tom            *Record me drivin'. What's up cuz? It's me driving. Gotta' record this shit...nigga.' What's up cuz...nigga.'*

(CP 1190 SEA.)

Others in the vehicle (though not the Defendant who was operating the video camera) pleading with him to slow down:

Jayme        Tom...

Brandon      Slow down nigger.

Jayme        Slow the fuck down. Hey.

(CP 1190.)

What was the response of Tom, whose driving was being recorded?

Tom            Hey – don't worry about me drivin'.

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<sup>11</sup> This was apparently said to the person operating the camera, or at the very least said so that the camera operator directed the camera's attention to the young daughter smoking a cigarette.

(CP 1190.)

When the trial court was ruling on the severance issue, the Defendant had pending charges of DUI and Reckless Driving,<sup>12</sup> both as an accomplice. These charges were in addition to the charges of furnishing liquor and tobacco to minors.

As the Plaintiff argued to the trial court in pre-trial hearings (CP 239-47, 684-701, 1316-22 SEA), according to the Plaintiff's theory of the case, the Defendant was liable for Tom's DUI and Reckless Driving via accomplice liability, not only by facilitating Tom's consumption of alcohol at the "party" at her apartment, but also by video-taping his driving. Based on what the video camera did at the party, she knew it would solicit and encourage Tom to act out, show off and exaggerate his recklessness. For that reason, the portions of the videotape to which the Defendant objected are illustrative of the promotion and encouragement of acting out and showing off for the camera, and competing for the camera's attention. Under the accomplice statute, (RCW 9A.08.020),

"a person is not an accomplice unless [that person] knowingly 'solicits, commands, encourages, or requests' the commission of a crime, or aids in the planning or commission [of the crime].... [P]hysical presence and assent alone are insufficient to constitute aiding and abetting.... [S]omething more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding [an accused] to be an accomplice."

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<sup>12</sup> Even though the trial court jury ultimately found the Defendant not guilty of Reckless Driving, that charge was pending at the time the trial court made its severance rulings.

*State v. Everybodytalksabout*, 145 Wn.2d 456, 39 P.3d 294 (2002), citing *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979).

In this case, the Defendant was not just “present” while the driver committed Drunk Driving and Reckless Driving, she encouraged his doing so by video-taping it, just as he (the driver) earlier encouraged the Defendant and others to act out and show off for the camera. Again, that acting out and showing off by the driver was evident on the videotape (Tom: Record me drivin’... It’s me driving. Gotta’ record this shit... [CP 1190 SEA]), just as were the reactions, statements and actions of the other passengers in the doomed vehicle trip. And just as others were encouraged to act out and show off in the other, earlier events and activities captured on the videotape.

The Defendant’s calling for the camera to record her daughter’s smoking and dancing (Kennedy, go grab my cigarettes off of the fireplace ... Look at what my daughter’s doing.... Shake your moneymaker for the camera.... Shake your moneymaker for the camera. CP 1188-1189 SEA) was consistent with the earlier propensity of the driver (and others) to show off and act out when on camera.

Accomplice liability is premised on the idea that a defendant need not participate in each element of the crime, nor must the accomplice/defendant share the same mental state required of the principal actor in the crime. *State v. Galisia*, 63 Wn. App. 833, 840, 822 P.2d 303 (1992). The law governing

accomplice liability seeks to punish the actions of a person intending to facilitate the commission of a crime by providing assistance to another through his presence or his actions. *Id.* Again, a person's physical presence and assent alone are insufficient to establish accomplice liability. *State v. Ferreira*, 69 Wn. App. 465, 472, 850 P.2d 541 (1993). "Aid" means all assistance whether given by words, acts, encouragement or support. *Ferreira*, 69 Wn. App. at 472. Accomplice liability is premised on the accomplice's general knowledge that he is assisting the principal in committing the crime. *State v. Cronin*, 142 Wn.2d 568, 581-82, 14 P.3d 752 (2000).

In *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), the court held that the accomplice must have acted with knowledge that his or her conduct would promote or facilitate "the crime" for which he or she is eventually charged, and that knowledge of "a crime" does not impose strict liability for any and all offenses that follow." *Roberts*, 142 Wn.2d at 513; *see also State v. Cronin*, 142 Wn.2d at 579. It is not necessary for an accomplice to have specific knowledge of every element of the principal's crime. *State v. Sweet*, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999). It is necessary only that the accomplice have general knowledge of the charged crime. *Cronin*, 142 Wn.2d at 579; *Roberts*, 142 Wn.2d at 512-13 (*citing State v. Rice*, 102 Wn.2d 120, 125, 683 P.2d 199 (1984) and *State v. Davis*, 101 Wn.2d 654, 657, 682 P.2d 883 (1984)). Here, the words and actions (including wielding the video

camera) of the Defendant were such words, acts, encouragement and support, and she knew the driver's driving was illegal. And because of her vantage (via the video camera), the Defendant knew and saw what was going on. The videotape captured what she did, what she said, what she saw and what she heard. The videotape shows that she knew that the driver was driving drunk and driving recklessly. That same videotape shows how the people captured on tape acted and were encouraged to act. For these reasons, the earlier activity was relevant to the later driving, and all of this was based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, per Rule 4.3(a)(2) CrR and CrRLJ.

#### 7. RELEVANT EVIDENCE

Again, relevance must be measured in terms of what is before the trial court at the time. Judge Burns ruled that the video-taping at the party (including the child smoking and dancing) was relevant to the later accomplice driving charges since, consistent with the Plaintiff's argument - theory, the earlier use of the video camera did encourage the acting out that continued at the defendant's hand in the later reckless and drunk driving, for which the Plaintiff argued the Defendant was liable as an accomplice.

Evidence must be relevant to be admissible. Rule of Evidence (ER)

401 defines Relevant Evidence as follows:

"Relevant evidence" means evidence having any tendency to make the existence of any *fact that is of consequence to the*

*determination of the action more probable or less probable than it would be without the evidence.*

(Emphasis added.)

*State v. Renfro*, 96 Wn.2d 902, 639 P.2d 737 (1982), *cert. denied* 459 U.S. 842, 103 S.Ct. 94, 74 L.Ed.2d 86 (1982), held that the test of relevancy is whether the evidence has a “tendency to make the existence” of the fact to be proved “more probable or less probable than it would be without the evidence.” In these regards, the evidence of the videotaped activity at the party – the acting out and competing for the video camera’s attention, makes the existence of the “aiding, promoting and encouraging” the errant driving more probable than it would be without that evidence.

ER Rule 402 addresses the admissibility or inadmissibility of evidence in terms of its relevance. ER 402 states as follows:

Rule 402. Relevant Evidence Generally Admissible;  
Irrelevant Evidence Inadmissible  
*All relevant evidence is admissible*, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

(Emphasis added.)

The videotape is therefore relevant evidence and admissible. It shows the “aiding, promoting and encouraging.” The Municipal Court was correct and was entitled to make its call. Also, evidentiary rulings and rulings as to what is relevant are the province of the trial court. And, per ER 403 the trial

court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. However, again, the determinations of such are left to the sound discretion of the trial court. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986); *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984). *See also State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997).

#### 8. PREJUDICE TO THE DEFENDANT

The RALJ court accepted the Defense argument that the videotape showing the Defendant's daughter smoking and dancing at her mother's behest was prejudicial to the Defendant and therefore the tobacco charge should have been severed from the other charges. However, that ignores the fact that even if the tobacco charge were severed, the earlier portion of the videotape is relevant to show how people (including the Defendant) show off and act up when "on camera," thereby encouraging and promoting such conduct. That is what the Defendant did when she focused the video camera on the driver and on the others in the vehicle.

#### 9. COMMON EPISODE

Adding to the legitimacy of combining charges, it must be recognized that "when multiple crimes arise from the same criminal episode, the time within which trial must begin on all crimes is calculated from the time that the defendant is held to answer any charge with respect to that episode." *State*

v. *Ross*, 98 Wn. App. 1, 5, 981 P.2d 888 (1999), *review denied*, 140 Wn.2d 1022, 10 P.3d 405 (2000). *See also State v. Harris*, 130 Wn.2d 35, 921 P.2d 1052 (1996); *State v. Peterson*, 90 Wn.2d 423, 431, 585 P.2d 66 (1978).

In *State v. Roybal*, 82 Wn.2d 577, 512 P.2d 718 (1973), the court discussed two tests used to define similarity of offenses, the “same transaction” and the “same evidence” test. Under the “same transaction” test, the offenses are the same if they “grow out of a single criminal act, occurrence, episode, or transaction,” regardless of the similarity of the offenses. *Roybal*, 82 Wn.2d at 581, (*quoting Ashe v. Swenson*, 397 U.S. 436, 453, 90 S.Ct. 1189, 1199, 25 L.Ed.2d 469 (1970)). The “same evidence” test compares the evidence and the law. This test holds that offenses are “the same” if the elements of one are sufficiently similar to the elements of another. *Roybal*, 82 Wn.2d at 580-81 (*citing Notes & Comments, Twice in Jeopardy*, 75 Yale L.J. 262, 269-70 (1965)).

Even though the offenses of DUI and Reckless Driving or Furnishing Liquor to a Minor do not share elements with the Furnishing Tobacco to a Minor, a court could conclude that these offenses all grow out of a single criminal act, occurrence, episode, or transaction - the events at the party and in the car. With that, the offenses of DUI and Reckless Driving and Furnishing Liquor to a Minor and Furnishing Tobacco to a Minor may need to be tried within the same speedy trial time-table. For that matter, their

evidentiary roots are essentially identical, and it would be unreasonable to require their severance.

The law does not favor separate trials. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). "Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Bythrow*, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). That burden demands that the moving party come forward with sufficient facts to warrant the exercise of discretion in his or her favor. *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). But, again, the trial court's discretion in denying severance may only be deemed an abuse if no reasonable person could adopt the trial court's view. In light of the above, that is not the case here.

#### 10. ADMISSIBILITY OF 911 TAPE

The Defendant also objected to the admission of the 911 tape at trial, arguing against its relevance and accuracy. Even if the description of the scene of the accident was not totally accurate in all details, it showed how things appeared to the caller, Ms. Roselle, including where the Defendant, the sole survivor, was located in the vehicle. (CP 785 SEA.) That categorically demonstrates the relevance of the 911 tape. The Defendant argued that some of the more upsetting descriptions were less than accurate and that the descriptions were therefore prone to be more prejudicial than probative. Yet

defense's argument ignores the "facts" that this single car accident resulted in the deaths of six young people. That was the central fact of this case, and little, if anything, could be more upsetting than that. Moreover, rather than Ms. Roselle's descriptions being incorrect, the description of dismemberment (actually facial skin having been separated) was a description of the horrific consequences of a single car accident that can only be the result of reckless driving.

Contrary to the Defendant's argument that the accident scene is not relevant to reckless driving, that is exactly what the accident scene is. It is relevant to whether or not the driver of the only car involved was driving recklessly; driving with a willful and wanton disregard for the lives or safety of anyone.

The court in *State v. Davis*, 154 Wn.2d 291, 296, 111 P.3d 844 (2005), held that the 911 tape was admissible under the excited utterance exception to the hearsay rule. A hearsay statement is admissible as an excited utterance if three criteria are satisfied: "(1) a startling event or condition occurred; (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition, and (3) the statement relates to the event or condition." *State v. Davis*, 141 Wn.2d 798, 843, 10 P.3d 977 (2000); ER 803(a)(2). That rule states, in pertinent part as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant  
Immaterial

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ...

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition

...

Clearly in this case that rule applies. The 911 tape was properly admissible even if the facts relayed in the 911 call were not as precise as they may have. That may be the case more often than not in an excited utterance case, but that still does not undo its admissibility.

If the Defendant were to argue that the admission the 911 tape was violative of the Sixth Amendment (United States Constitution) confrontation clause, based on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 72 USLW 4229, 63 Fed. R. Evid. Serv. 1077, 04 Cal. Daily Op. Serv. 2017, 2004 Daily Journal D.A.R. 2949 (2004), that argument (not made) fails. In its analysis in *Crawford*, the Supreme Court made it very clear, however, “not all hearsay implicates the Sixth Amendment’s core concerns.” *Id.* at 51. The Sixth Amendment applies only to witnesses against the accused, “those who bear testimony.” *Id.* The Court specifically defined “testimony” as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.*

For that matter, *Crawford*, which held that out-of-court statements that are testimonial in nature must be excluded under the confrontation clause

unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant, does not fit 911 calls where the caller is calling for emergency help. Such a caller is not “bearing witness,” and thus the call will not be the equivalent of a “testimonial statement.” *State v. Davis*, 154 Wn.2d at 301. *Davis* cited *People v. Corella*, 122 Cal.App.4th 461, 18 Cal.Rptr.3d 770, 04 Daily Journal D.A.R. 11,645, 04 Cal. Daily Op. Serv. 8533 (2004), where the court held that admission of a 911 call did not violate the defendant’s right to confrontation. Here too, the 911 call fits within the excited utterance exception to hearsay, consistent with Judge Burns’ ruling, and it did not violate the Defendant’s right to confrontation.

#### 11. PROBATIVE VERSUS PREJUDICE

The Defendant argued that the 911 tape was too prejudicial to be admitted, a similar argument to that made regarding the admission of the earlier part of the videotape. Like evidentiary rulings, it is up to the court to decide in its discretion, if evidence will assist the jury. ER 702; *Norris v. State*, 46 Wn. App 822, 733 P.2d 231 (1987). As noted in *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986), the trial court has considerable discretion in balancing the probative value of evidence against its potential prejudicial impact. *See also State v. Reay*, 61 Wn. App. 141, 810 P.2d 512, review denied by *State ex rel. Taylor v. Reay*, 117 Wn.2d 1012, 816 P.2d 1225 (1991).

## 12. GRUESOME EVIDENCE ADMISSIBLE

In evaluating the prejudicial effect (versus the probative value), it is helpful to compare what courts have done with evidence that was certainly more potentially prejudicial than anything in the videotape. In *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991), the court said that pictures argued by the defendant as being gruesome (and thus [per the defendant's argument] should have been excluded under ER 403) were properly admitted, because they were accurate portrayals of what they showed, they were relevant. The court added that accurate photos are admissible if their probative value outweighs any prejudicial effect. *State v. Noltie*, 116 Wn.2d at 852, citing *State v. Crenshaw*, 98 Wn.2d 789, 805, 659 P.2d 488 (1983). Also, in *State v. Tharp*, 27 Wn. App. 198, 616 P.2d 693 (1980), the court ruled that the admission of five photographs and a videotape of the victim was not error on grounds that evidence was gruesome - showing that the victim died of gunshot wounds.

The audio descriptions on the 911 evidence (again, significantly less "gruesome" than the above described photographs) would not be so prejudicial as to substantially outweigh its probative value. ER 403.

## III. CONCLUSION

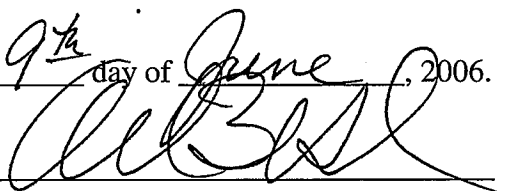
As noted above, the Defendant, Teresa Hedlund, did things that she knew would encourage and aid Tom Stewart's illegal driving. She was

therefore an accomplice, and she was not excused from that accomplice liability by virtue of the fact that she was ultimately injured as a result of the errant driving she helped to promote. While RCW 9A.08.020(5)(a) exempts a "victim" from being an accomplice to a crime, that does not apply to this case. The Defendant was only hurt after she completed all action that would - could - make her an accomplice.

Additionally, based on the facts of this case, and the charges pending against the Defendant when certain evidentiary rulings were made by the trial court, those rulings were well within the trial court's discretion. They should not have been reversed by the RALJ court.

This Court should (1) reverse the RALJ court (King County Superior Court Cause No. 03-1-04645-7 SEA) rulings, reinstate the trial court evidentiary rulings, and affirm the convictions from which the Defendant initially appealed, and (2) uphold the Writ court (King County Superior Court Cause No. 03-2-00810-9 KNT) rulings regarding the accomplice-victim exception.

Respectfully submitted this 9<sup>th</sup> day of June, 2006.

  
Daniel B. Heid, WSBA # 8217  
Attorney for Respondent/Cross-Appellant  
City of Auburn

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IN THE SUPERIOR COURT OF STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

THE CITY OF AUBURN,

Plaintiff/Respondent/  
Cross-Appellant,

v.

TERESA A. HEDLUND,

Defendant/Appellant/  
Cross-Respondent.

CAUSE NO. 03-1-04645-7 SEA

VIDEOTAPE TRANSCRIPT

(The Videotape was played at the Trial  
[Trial Transcript pages 778 – 780, 781]  
but it was not transcribed or included in  
the Transcript submitted by Defendant  
with her Appeal Brief)

CERTIFIED TRANSCRIPT OF VIDEOTAPE

08:22:30pm Unknown  
Unknown

You're on candid camera homey.  
Work it.

09:26:55pm Unknown  
April  
Brandon

Hey.  
We got booze on.  
What up?  
Capt'n Morgan's and ah...MGD...  
Hey – give me a kiss.

09:27:00pm April  
Brandon

09:28:56pm Tom

There's my nigga' ... Slim Shady.  
April's in the bathroom, homey.  
This is my beer right here.....right here.  
"I'm not turning to the fuckin' videotape-  
You're my fuckin' brother.

April (in background)

VIDEOTAPE TRANSCRIPT

Page 1

Appendix A

1	Brandon (in background)	No I'm not.
2	Tom	There..here's Tim's girl.
3	Marcus	There she is.
4	Tom	Pee on....pee on...
	Marcus	Ah - there's my nigga' Marcus.
5	Tom	There goes my nigga.'
		Dude.
		There goes my nigga.'
6	(background noise)	
7	09:29:26pm Tom	Hey, here we go right here.
8		Hey Slim, break it off to her cuz...ay
		cuz... hey cuz.
9	Teresa (in background)	Kennedy, go grab my cigarettes off of
	Kennedy (in background)	the fireplace.
10	Tom	Ok.
		Look at that action homey...look at that
11	April (in background)	action. Look at that.
12	Teresa (in background)	<unintelligible> now get outta here.
		Kennedy, Kenniedy, Kennedy, Kennedy,
		Kennedy.
13	Tom	On the fireplace, right up here honey.
	Jayme	Jayne, Jayme come here girl.
14	Tom	What?
	Jayme.	Look at that, uh hh.
15	April (in background)	Put that camera away.
		I can't stand being here - I just wanna
16	Unknown	get drunk real fast.
	Brandon (in background)	<unintelligible>
17	Teresa	Did you get that on tape?
		<unintelligible>
18	Brandon	You want to try some?
	Tom	<unintell>...the camera...
19	Tim	Alright, you record...
	Tom	Noodles.
20		Record the homeys.
		It's already on record.
21		Hey -
		Record me.
22	Teresa	Noodles...Noodles.
	Brandon	Huh?
23	April (in background)	You are trippin.'
	Teresa	Look what my daughter's doing.
24	Tom	Hey Kennedy...dance.

1		Tom	Hey girl...Kennedy.
2		Teresa	No, no wait hon - give me your cigarette.
3	09:30:30pm	Tom	Do your thing Kennedy.
4	09:31:31pm	Teresa	Shake your moneymaker for the camera.
5		Brandon	Ooh girl.
6		Teresa	Shake your moneymaker for the camera.
7		Brandon	Work it girl.
8			Work it.
9		Tom	Work it.
10		April	Hey Slim...Slim.
11			I seen her doing that shit...I was like
12		Teresa (in background)	"Get down girl" Yeah...guys'll love
13		Brandon	that shit... Wahoo.
14	09:49:47pm	Jayne	Look again.
15			Who - Jayme's tits look good in this...
16	09:49:58pm	Unknown	What?
17		Tom	<unintelligible>
18		Brandon	Record it Noodles.
19		Tom	Are you peein'?
20		April	I'm fucked up.
21		Tom	(laughing)... Yeah...go girl.
22		April	Hah - that's <unintelligible> cuz..
23		Tom	Go girl.
24		April	C'mon girl let's...alright...dance to this
25		Tom	Ah girl.
		April	Hey...I'm fucked up boy.
		Tom	We're fuckin' liquored up cuz.
		April	Waoooo.
		Tom	But we're fuckin' gonna do this.
		April	Yeahhhhh.
		Tom	But my nigga' Noodles - my nigga' Slim
			Shady - gonna get that shit started on
			that big camera...nigga' - we gonna get
			his big ole' horse dick up in this...
		April	Yeah...<unintelligible>
		Tom	Uh ... She said yeah too...she knows
			Nigga' - she knows-she knows. We're
			gonna get my nigga' slim's horse dick up
			in this...
		April	No - 'aint getting shit in it man - Fuck
			that shit.
			Fuck you.
		Tom	Fuck you.
			Ah - my nigga' slim shade...

VIDEOTAPE TRANSCRIPT

1	Tom	Ah.
2	Tom	Ah.
	Brandon	Yeah I am...
3	Tom	My nigga' Slim's - he gonna get it.
	April	Lick 'em.
	Tim	<unintelligible> bro.'
4	Brandon	What up.
	Brandon	What up.
5	Unknown	<unintelligible>
6		
		CAR RIDE
7	10:25:06pm Brandon	Bumh, bumh, bumh, bumh.
	Unknown	<unintelligible>
8	Tim	Wahoo.
	Brandon:	<unintelligible> (singing)
9	Teresa:	You gonna' get a piece of ass off of April?
10	10:25:29pm Tom	Record me drivin.'
11		What's up cuz?
		It's me driving.
12		Gotta record this shit...nigga.'
		What's up cuz...nigga.'
13	10:26:02pm Jayme	Tom...
	Brandon	Slow down nigger.
14	Jayme	Slow the fuck down.
		Hey.
15	Tom (in background)	Hey - don't worry about me drivin.'
	Brandon	Want me to put it on night vision?
16	Teresa	Yeah.
17	10:26:31pm Teresa	How much you love me?
	Tim	This much.
18	Teresa	Hey girls.
	Brandon (in background)	Wahhh.
19	Teresa	Are you getting a piece of ass tonight off of April?
20	Brandon	Uh huh.
21	10:26:49pm Jayme	Tom - slow your fuckin' ass down or stop the fuckin' car.
22	Teresa	Jayme - you want me to drive?
	10:26:59pm Jayme	No, stop the fuckin' car!
23		
	10:27:04pm Tim hits head on roof	
24		
25	VIDEOTAPE TRANSCRIPT	

1	Brandon	(singing)
2	Tim/Brandon	(talking)(laughing)
3	Brandon	Tom, what happened?
4	10:27:43pm Tim	I gotta' pee so bad... I gotta' pee.
5	10:27:58pm Brandon	Here come the other train tracks.
6	Teresa turns around in car seat and turns back Tim hits head on roof	
7	Brandon	(singing)
8	Brandon	Hey, Tom, put another CD in.
9	Teresa	You're being funny Tom.
10	Jayme	Tom...slow down.
11	Teresa	I love you.
12	Jayme	<unintelligible>...Tom.
13	Tom	Shut the fuck up...god damn it.
14	Brandon	Yeah - shut up.
15	Tom	Don't try to fuckin' yell when I'm fuckin' drivin'... shit...
16	Brandon (in background)	Just play good music.
17	Teresa (in background)	Cuz your drivin'... <unintelligible>
18	Jayme	Asshole.
19	Brandon (in background)	You're going to drive in the fuckin' right Lane.
20	Tom	Just play good music DJ.
21	Brandon (in background)	Does it look like I'm driving in the right Lane.
22	Jayme	Two...two.
23	Tom	Yeah, now it does.
24	Brandon	Alright - well fuck ya all - I'm gonna drive like I want to.
25	Jayme	Hey Tom.
26	Tom (in background)	Tom, you're going to fuckin' drive the speed limit or you're gonna fuckin' stop the fuckin' car.
27	Brandon	Alright---...I'm going to kill us all right Now.
28	Jayme	Hey Tom...hey Tom look at this.
29		Tom, will you fuckin' stop < unintelligible > Tom.
30		<Videotape stops.>

CERTIFICATE

I, Darla Dowell, declare under penalty of perjury under the laws of the State of Washington that the foregoing is a true and correct transcript of the Videotape played in evidence at the trial of the above case before the Auburn Municipal Court on January 30, 2003.

DATED this 8<sup>th</sup> day of June, 2004, at Auburn, Washington.

Darla Dowell  
DARLA DOWELL

**9A.08.020. Liability for conduct of another--Complicity**

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

CITY OF AUBURN,	)	Case No. NO. 51791-1- I
	)	
Respondent/	)	(King County Superior Court
Cross-Appellant,	)	Cause No. 03-1-04645-7 SEA)
vs	)	
	)	CERTIFICATE OF SERVICE
TERESA A. HEDLUND,	)	OF REVISED OPENING
	)	BRIEF OF RESPONDENT/
	)	CROSS-APPELLANT
Appellant/	)	
Cross-Respondent.	)	

I, Daniel B. Heid, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I delivered a true and correct copy of the Revised Opening Brief of Respondent/Cross-Appellant concerning the above entitled matter to:

Matthew V. Honeywell, WSBA # 28876  
Attorney for Appellant/Cross-Respondent  
323 First Avenue West  
Seattle, WA 98119

by: ☐ personally serving the same on \_\_\_\_\_  
☒ depositing the same in the U.S. Mail, postage prepaid, to the above address.  
☐ delivering the same to ABC Legal Messenger Service for delivery to the above address.

SIGNED at Auburn, Washington, this 9<sup>th</sup> day of June, 2006.

Daniel B. Heid  
Signature

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